84-1343

No. ———

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEMPSTER and PAULINE FERGUSON, EDDIE and BERNICE JIMMONS, NEAL and ROSE PLANTZ, DELORES SNIPES, ROBERT and REBECCA TORRY, LEON and RITA VANDERFELTZ, and RAPHAEL and HOPE ZAPIEN,

Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Missouri

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

In holding unconstitutional a program of remedial educational services that Blue Hills Homes Corporation provides to private school children in Missouri under a contract with the United States Department of Education and pursuant to the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), did the court below err in ruling that this Court's Establishment Clause decisions create a *per se* rule prohibiting the assignment of school teachers paid by public funds to provide instruction of any kind on the premises of church schools?

PARTIES TO THE PROCEEDING

The Secretary of the United States Department of Education and several subordinate federal officials were defendants in the court below. The Blue Hills Homes Corporation and its Executive Director, John P. Cole, also were defendants. Appellants Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien, parents of private school children eligible for Title I services, intervened as defendants. G. Hugh Wamble was the *pro se* plaintiff. Thirty-nine federal taxpayers, including seven parents of public school students, intervened as plaintiffs: Verline Cobbins, Alma V. Burt, Helen M. Hardiman, Odessa Hill, Mae Bell Washington, Dorothy H. McDonald, Bernether Macklin, Frank Calcote, Russel M. Bradly, Walter A. Reed, Robert G. Parsons, Jr., Roy A. Dickie, William C. Heck, Jr., Clarence E. Shockley, Clinton Smith, Mack E. McCorkle, John A. Souris, Clyde Morton, Lee Shearer, Paule H. Linhardt, August Trost, Roy E. Willey, Forrest F. McBaine, Carl C. Desmond, Lyle Kenneth Vale, W. Carter Durbin, Jack C. Collister, Eldon J. Cusic, Jack Furlong, Dennis Hammontree, Thomas C. Hurt, Paul K. Kawakami, Jim S. Noel, Stanley A. Pearson, Duane C. Purdy, Larry McCrory, Joseph E. Sheets, Jr., Joseph E. Stewart, and Marcus W. Doughty.

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No. ———

DEMPSTER and PAULINE FERGUSON, EDDIE and BERNICE JIMMONS, NEAL and ROSE PLANTZ, DELORES SNIPES, ROBERT and REBECCA TORRY, LEON and RITA VANDERFELTZ, and RAPHAEL and HOPE ZAPIEN,

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JURISDICTIONAL STATEMENT

Appellants Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien appeal from a judgment of the United States District Court for the Western District of Missouri holding unconstitutional under the Establishment Clause the program of the United States Department of Education and Blue Hills Homes Corporation for providing remedial educational services to chil-

dren in private, church-affiliated schools under Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982).[1] The question presented in this case is identical to the constitutional issue before this Court in *Aguilar v. Felton*, Nos. 84-237, 84-238, and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984), which was argued before this Court on December 5, 1984.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri is reported at 598 F. Supp. 1356 (1984), and is printed in the Appendix to this Jurisdictional Statement.

JURISDICTION

On April 4, 1977, appellee Wamble filed a complaint in the United States District Court for the Western District of Missouri alleging that the method adopted by the United States Office of Education[2] and its contractor,

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[1] Appellees' complaint attacked the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982). Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act ("Chapter 1"), which was enacted as Title V, Subtitle D of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 464 (1981) (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). However, Chapter 1 incorporates by reference many sections of former Title I, *see* 20 U.S.C. § 3803 (1982), and includes virtually identical provisions governing participation of private school students. Because the evidence that constitutes the record in this case was developed prior to the enactment of Chapter 1 and because the references in that evidence and in the opinion of the court below identify the program as "Title I," that designation of the program will be used throughout this Jurisdictional Statement.

[2] This action originally named the Commissioner and various other officials of the United States Office of Education as defen-

Blue Hills Homes Corporation, for providing federally funded Title I remedial educational services to children in private, church-affiliated schools in Missouri violated the Establishment Clause of the First Amendment. On November 28, 1984, the district court filed a Memorandum Opinion and Order holding that the program in Missouri of federally funded Title I remedial educational services for private school students violated the Establishment Clause. The district court entered judgment on December 3, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1252. *See United States v. Darusmont*, 449 U.S. 292, 293 (1981).[3]

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dants. With the establishment of the United States Department of Education in 1979, the successor defendants became the Secretary of the Department of Education and officials of that Department.

[3] The considerations that support this Court's jurisdiction under § 1252 include the following. First, Title I authorizes, and Congress specifically contemplated, the expenditure of federal funds for on-premises instruction of the very kind that the district court held unconstitutional. *See Wheeler v. Barrera*, 417 U.S. 402, 422-23 (1974). Other suits challenging the constitutionality of Title I have revealed that on-premises services for students in church-affiliated schools is probably the norm throughout the country. *Aguilar v. Felton*, Nos. 84-237, 84-238, and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984); *Stark v. Bell*, No. 4-78 Civil 222 (D. Minn., voluntarily dismissed on April 13, 1984); *Barnes v. Bell*, C.A. No. C-80-0501-L(B) (W.D. Ky., filed Oct. 2, 1980). Second, a central purpose of the Title I program is to assure that private school children receive remedial services comparable to those provided to public school children. *See* 20 U.S.C. § 3806(b) (1982), and 34 C.F.R. § 200.71(b) (1984). The record in this case shows that this congressional purpose can be achieved only by on-premises instruction. Third, the Secretary of Education is clearly "bound" by the holding of unconstitutionality below. *McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975). *See California v. Grace Brethren Church*, 457 U.S. 393, 404-07 (1982). Indeed, the district court expressly contemplated an off-premises plan. Fourth, in *Flast v. Cohen*, 392 U.S. 83, 88-91 (1968), the Court held that a claim that New York City's Title I program violated the Establishment Clause—the same claim made by plaintiffs here—was properly brought before a three-judge court under

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves a challenge under the Establishment Clause of the First Amendment to the constitutionality, as applied, of Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982). Pertinent portions of the First Amendment and the statute are printed in the Appendix to this Jurisdictional Statement (hereinafter cited as "App.").

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28 U.S.C. § 2282 (1970 ed.). Section 2282, which was enacted as part of the same statute as § 1252, *see* Judiciary Act of 1937, ch. 754 §§ 2, 3, 50 Stat. 752, provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress on grounds of unconstitutionality. Fifth, because the decision of the district court "cast[s] sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround" Title I, the "legislative policy" underlying § 1252 would be served by the exercise of this Court's appeliate jurisdiction. *Flast v. Cohen*, 392 U.S. at 90. Indeed, unless reversed by this Court, the court of appeals' decision in *Aguilar* and the district court's decision in this case are likely to affect Title I programs throughout the country. For these reasons, despite the appellees' focus in this case on the Title I bypass program in Missouri for private school children, these appellants believe that the district court held unconstitutional a common application of an Act of Congress and that this Court's appellate jurisdiction is, therefore, properly invoked under 28 U.S.C. § 1252.

Because the jurisdictional question in *Aguilar* is outstanding, it is not certain that the proper course for appellants in this case is to appeal to this Court pursuant to § 1252 or to the Court of Appeals for the Eighth Circuit pursuant to § 1291. Accordingly, these appellants have filed a Notice of Appeal to the Court of Appeals for the Eighth Circuit as a protective measure. On February 7, 1985, the Court of Appeals for the Eighth Circuit stayed all proceedings of the protective appeal to that court pending this Court's resolution of the jurisdictional issue in *Aguilar v. Felton*.

STATEMENT OF THE CASE

A. The Proceedings Below

Appellee Wamble, a federal taxpayer claiming standing as such, filed the complaint in this case in the United States District Court for the Western District of Missouri on April 4, 1977. The complaint named as defendants the then Commissioner of the United States Office of Education, the Secretary of the Department of Health, Education, and Welfare, other officials of the Office of Education, Blue Hills Homes Corporation (hereinafter referred to as "Blue Hills"), and Blue Hills' Executive Director.[4] These appellants, parents of children attending private schools in Missouri, were permitted to intervene as defendants on August 29, 1977, to protect their children's interest in continuation of the Title I program. Thirty-nine federal taxpayers, including seven parents of public school students eligible to receive Title I assistance, were permitted to intervene as plaintiffs on September 13, 1978, and are also appellees in this appeal.

During the pre-trial period, a virtually identical Establishment Clause challenge to New York City's Title I program for private school students was pending in the United States District Court for the Southern District of New York. *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D. N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) (hereinafter referred to as "*PEARL*"). As a result, the district court stayed this case on March 30, 1979, pending the disposition of *PEARL*.[5] After the three-judge district

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[4] Blue Hills is a nonprofit corporation, incorporated under the laws of Missouri, and has as one of its purposes the revitalization of older urban neighborhoods through housing renovation, crime prevention, education, mortgage and insurance reform, job training, and community organization.

[5] One of the reasons advanced for the stay was that G. Hugh Wamble, appellee in this case, was a named plaintiff in *PEARL*. Also at this time, appellees in the *Aguilar v. Felton* case had filed a

court in *PEARL* rejected the constitutional challenge to New York City's Title I program and this Court dismissed the appeal from that decision for want of jurisdiction, 449 U.S. 808 (1980), the stay was dissolved on October 31, 1980, and appellees renewed this constitutional challenge to Title I.

The district court conducted a twenty-three day evidentiary hearing between August 2, 1982, and January 13, 1983. The court below heard extensive testimony from officials of the United States Department of Education, supervisors and Title I teachers from the Blue Hills Homes Corporation, and superintendents and principals of Catholic and Lutheran schools. The trial court also received into evidence thousands of pages of deposition testimony and hundreds of exhibits. Shortly thereafter, the parties submitted proposed findings of fact and conclusions of law to the district court, which heard final argument on March 30, 1983.

On November 28, 1984, the district court issued its decision, which holds that providing Title I remedial instruction on the premises of church-affiliated schools constitutes a *per se* violation of the Establishment Clause under this Court's earlier decisions. The district court permanently enjoined the challenged Title I program but *sua sponte* stayed its injunction pending this Court's disposition of *Aguilar v. Felton.* Judgment was entered below on December 3, 1984. On December 24, 1984, these appellants filed with the district court their Notice of Appeal to the Supreme Court of the United States.

B. The Challenged Program

The Title I remedial educational program at issue in this appeal represents perhaps the most significant federal educational program ever undertaken. Undisputed evidence presented at the trial of this case showed that

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complaint in the United States District Court for the Eastern District of New York. The trial court stayed proceedings in that case pending the disposition of *PEARL.*

in the 1980-1981 school year, more than five million school children, including approximately 192,000 private school children, received remedial educational benefits and related services through Title I projects throughout the United States. Approximately $3 billion was allocated for Title I grants; about four percent of this amount was devoted to Title I services for private school children. During the 1980-1981 school year, 95,000 public school students participated in Title I in Missouri, and Blue Hills Homes Corporation provided Title I services to approximately 3,300 private school students.

Title I was enacted in 1965 to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965). The program was designed "to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children." 20 U.S.C. § 3801 (1982). Congress determined that "there is a close relationship between conditions of poverty and lack of educational development and poor academic performance" and enacted Title I "as [a] very potent instrument to be used in the eradication of poverty and its effects." S. Rep. No. 146 at 5. *See* 20 U.S.C. § 3801 (1982).

Congress appropriates funds annually to support programs proposed by local educational agencies ("LEAs") and approved by state educational agencies ("SEAs"). The LEA is solely responsible for administering and staffing the program for which it receives federal funds. To be eligible for Title I funds, an LEA's program must satisfy certain statutory criteria designed to assure that the statute's purposes are advanced. For example, only children who satisfy the dual eligibility criteria of educational and economic deprivation can qualify for Title I remedial instruction. 20 U.S.C. §§ 2722, 2732-34 (1982).[6]

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[6] A child is considered educationally disadvantaged if he is performing below grade level in certain subject areas. A child is con-

In addition, Title I funds are available only for programs that will supplement, and not supplant, non-federally funded programs that would have been available in the absence of Title I funds. 20 U.S.C. § 3807(b) (1982). Finally, the statute requires LEAs to extend Title I services on an equal and equitable basis to eligible children who attend private schools. 20 U.S.C. § 3806 (1982).

Prior to 1974, if the SEA or LEA failed to provide for the equitable participation of eligible private school children, the remedies available were to delay approval of a funding application or to withhold funding for all Title I programs, including public school programs, in the SEA or LEA. 20 U.S.C. §§ 241f, 241j (1976); *see also* 20 U.S.C. § 2836(a) (1982). In 1974, Congress amended Title I to authorize the federal government to bypass the LEA and provide Title I services directly to private school children where the SEA or LEA refuses or fails to provide genuine opportunities for equitable participation of private school children in the Title I program. Pub. L. No. 93-380, 88 Stat. 484 (originally codified at 20 U.S.C. § 241e-1(b) (1976)), 20 U.S.C. §§ 2740(b), 3806(b) (1982).

Before the 1973-1974 school year, Title I benefits provided to private school children in Missouri consisted of equipment and instructional materials only, while public school students received remedial instruction at their schools.[7] In *Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974), the Court of Ap-

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sidered economically disadvantaged if he lives in an area that has a high concentration of low-income families. Title I services are available to eligible children regardless of whether they attend public or private school.

[7] The remaining description of Title I and the Missouri program at issue in this case is drawn from the district court's opinion. *See* App. 4a-15a.

peals for the Eighth Circuit held that the State Commissioner of Education and the Missouri Board of Education had violated the Title I requirement to provide comparable services to private school children.

Pending appeal of the Court of Appeals for the Eighth Circuit's decision to this Court, the district court issued an injunction in May 1973 ordering the LEAs to provide comparable Title I services to private school children in the form of on-premises remedial instruction during the regular school day. During the 1973-1974 and 1974-1975 school years, eligible private school students were released from their regular classes to receive instruction in a Title I class on the premises of the private school ("pull-out" instruction).

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court affirmed the court of appeals, declaring that the services provided to the private school students had been "plainly inferior, both qualitatively and quantitatively." 417 U.S. at 415. The Court declined to decide whether Title I's "equitable participation" requirement called for on-premises instruction or whether on-premises instruction would be constitutional. Instead, it remanded the case to the district court which, in August 1975, dissolved its 1973 injunction and accepted the Missouri SEA's plan to approve LEA applications providing for comparable per-pupil expenditures but otherwise failing to ensure a program for private school children comparable in size, scope, and opportunity to participate with that provided to public school children. *Barrera v. Wheeler*, 531 F.2d 402, 406-07 (8th Cir. 1976). In implementing the court-approved plan, the Missouri SEA approved LEA applications to provide Title I services to private school children on public school premises before or after regular school hours or on Saturday. Public school children continued to receive "pull-out" instruction on premises during the regular school day. The number of private school participants in Title I dropped by one-half.

In 1976, private school representatives in Missouri asked the Commissioner of the United States Office of Education to consider a bypass of the state and local educational agencies. Officials from the United States Office of Education conducted a thorough investigation and concluded that poor attendance of private school children was due to student and teacher fatigue, conflicts with after-school activities, late home arrival, parental concern for safety, students' perception of the after-hours program as punishment, and conflicts with family obligations. The investigating team found that 31.2 percent of the private school students' Title I budget was spent on teachers' salaries and that 40 percent was spent on non-instructional costs such as transportation and rental of facilities. In contrast, 72.8 percent of the funds for the public school programs was applied to teachers' salaries.

On July 22, 1976, the Commissioner decided, pursuant to 20 U.S.C. § 3806(b) (1982), to bypass the four LEAs that had been investigated. After soliciting bids on three Missouri LEA bypass projects, the Office of Education, on February 14, 1977, awarded the contracts to Blue Hills Homes Corporation. A fourth contract was awarded to Blue Hills on October 1, 1977, and by the end of the 1979-1980 school year, the Department of Education had consolidated its award for statewide private school Title I services under one contract with Blue Hills, bypassing fifty-three Missouri LEAs.[8]

Blue Hills administers the Title I program for private school students in accordance with contract specifications and in virtually the same manner that the New York City Board of Education has implemented the Title I program for private school students at issue in *Aguilar v. Felton*. The educational services are provided to eligible

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[8] This contract expired on July 31, 1982. Under established contract procurement procedures, it was again awarded to Blue Hills for the 1982-1983 school year.

students at the private schools[9] during regular school hours and include supplemental instruction in remedial reading, mathematics, and language arts.

Blue Hills trains and monitors its teachers to ensure religious neutrality. The Blue Hills teachers are told that they are solely accountable to their Blue Hills supervisors and have no accountability to private school administrators or teachers; that they are solely responsible for selecting students for the Title I program; that materials and equipment for the Title I activities must have no religious content and are used only in the Title I program; that they are not to engage in team-teaching or other cooperative instructional activities with private school teachers, not to become involved in any religious activities in the private school, and not to introduce anything of a religious nature into their teaching or allow any religious discussion. Any effective remedial program requires that the remedial teacher confer with a student's regular classroom teacher to determine the student's needs and classroom progress in the subject in which he is receiving remediation. While the Title I teachers are told that such communications are permissible, they are instructed to confine such consultations to mutual professional concerns about their students' educational needs and not to engage in any discussion of matters of a religious nature. Finally, the Blue Hills teachers are instructed to maintain the Title I classroom free of religious symbols.

To ensure that these guidelines are satisfied, Blue Hills teachers are under the direct and sole supervision of Blue Hills supervisors, who train and monitor them. Private school personnel exercise no control over the program, the teachers, or the Title I curriculum. Blue Hills supervisors inspect the Title I facilities to ensure that the sites

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[9] As the district court noted, the majority of private school students receiving Title I services attend schools that are church-affiliated.

are adequate and free of religious artifacts. The Title I bypass teachers refrain from any religious discussions. Title I classrooms generally are reserved for the exclusive use of the Blue Hills teachers, and Title I materials are used only for Title I purposes.

Indeed, the appellees presented no evidence that any of the guidelines had been violated in the five years that Blue Hills administered the bypass program. The only exception, as the district court noted, was that religious symbols were found in Title I classrooms on fifteen occasions. In each instance but one, the objects upon discovery were promptly removed or, if nonremovable, were covered.

Contacts between administrators of the Title I bypass program and private school officials are routine in character and fall into three general categories—discussions about planning or scheduling, consultations regarding the educational progress of Title I students, and contacts incidental to monitoring the Title I program. The last category includes Blue Hills personnel requesting the private school administrators to remove any visible religious symbols in the Title I classrooms. Moreover, beginning in 1980, the Department of Education required Blue Hills to obtain from private school officials an assurance of suitable facilities and, in 1981, written assurance that the settings are religiously neutral. There is no evidence in the record to show or suggest that these administrative contacts have involved Title I administrators in the curricula or operations of private schools or have given private school officials any control at all over the Title I program.

C. The District Court's Decision

The district court's constitutional analysis follows that of Judge Friendly in *Felton v. Secretary, United States Department of Education*, 739 F.2d 48 (2d Cir.), *question of jurisdiction postponed sub nom. Aguilar v. Felton*, Nos. 84-237, 84-238, and 84-239 (Oct. 9, 1984). Indeed,

the district court adopted Judge Friendly's discussion of the relevant cases.[10] That discussion focused on four decisions that had dealt with the core issue of the constitutionality of sending public school teachers on the premises of church-affiliated schools to provide instruction: *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd summarily*, 417 U.S. 961 (1974); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977). The Court of Appeals for the Second Circuit concluded that those four cases had, in effect, established a *per se* rule prohibiting public school teachers from offering instruction of any kind on the premises of church-affiliated schools. *See* 739 F.2d at 64. The district court in this case reached the same legal conclusion.

These appellants and the other defendants below contended that more recent decisions of this Court establish that neither *Meek* and *Wolman* nor any of the Court's other Establishment Clause decisions intended to create *per se* rules.[11] While acknowledging that *Meek* invalidated a program with many of the features of Title I, defendants below noted that this Court's decision in that case rested on its perception of certain potentials and dangers that might flow from the auxiliary services program at issue there. Defendants below noted, however, that this Court refused in *Wheeler* to decide the constitutionality of an on-premises Title I program because it had no specific program before it. 417 U.S. at 426. Defen-

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[10] The district court observed that "*Felton* is strikingly similar in its facts and issues to the case at bar and this court finds Judge Friendly's exposition of the development of the law to be thorough and persuasive. We, therefore, adopt his analysis, limiting this discussion to the law as it relates to the facts before us." (App. 2a n.1).

[11] For example, in its most recent Establishment Clause decision, this Court admonished: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984).

dants below noted that the record in this case disclosed that none of the potentials or dangers that concerned the Court in *Meek* had materialized in the Missouri Title I bypass program during its five-year history of on-premises instruction. In light of this Court's suggestion in *Wheeler* that the parties to litigation such as this develop a record of a program's operation, defendants below contended that the facts concerning the operation of the program were a sufficient basis for distinguishing *Meek*. The district court rejected those arguments.

The district court held that because "Title I, on its face, does not require or suggest that its program be conducted on the premises of religiously affiliated schools . . . . [o]n its face, Title I does not violate the Establishment Clause." (App. 32a). Applying the familiar three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to the bypass program as applied in Missouri, the district court held that Title I serves a secular legislative purpose. (App. 22a). The court below did not decide whether the Title I bypass program's primary effect advances or inhibits religion because it held that there was a violation of the excessive entanglement element of the test. (App. 22a-32a).[12]

The district court's excessive entanglement conclusion rests on the same hypothetical concern with risks, potentials, or possibilities that underlies the holding by the Court of Appeals for the Second Circuit in *Aguilar*. For example, the district court referred to "the risk or danger of unconstitutional indoctrination" (App. 28a), and "an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance" (App. 29a) (emphasis in original). The

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[12] Appellees also advanced two administrative law claims in the court below, attacking the decision of the Commissioner of the United States Office of Education to invoke the bypass and the award of the Title I bypass contracts to Blue Hills. The district court rejected both challenges. (App. 17a-18a).

court below further declared that the teachers "are presumptively influenced by the environment in which they work" (App. 30a), and that "[t]he *danger* perceived in *Meek* does not subside with the abandonment of religious artifacts" (App. 30a) (emphasis in original).

The plaintiffs below failed to meet their burden of proof to show that any of these speculative concerns had, in fact, occurred. Indeed, the defendants presented substantial evidence that the program at issue satisfies Establishment Clause standards. Nevertheless, the district court rested its decision on unadorned speculation about potential constitutional problems in an on-premises program. The district court's approach is the very antithesis of the doctrinaire and result-oriented jurisprudence this Court warned against in *Wheeler v. Barrera* and its recent Establishment Clause decisions.

THE QUESTION IS SUBSTANTIAL

1. The question presented in this case is virtually identical to the question presented in *Aguilar v. Felton*, which was argued before this Court on December 5, 1984, and is presently under advisement. The district court stated that the "decision [in *Aguilar*] may very well affect the result reached here" (App. 2a), and, as noted above, adopted the analysis of the Court of Appeals for the Second Circuit in *Aguilar* of Establishment Clause case law. (App. 2a n.1).[13] The court below permanently enjoined the challenged Title I program but *sua sponte* stayed its injunction pending this Court's disposition of *Aguilar v. Felton*. Accordingly, these appellants urge the Court to hold this appeal in abeyance pending the outcome in *Aguilar v. Felton*, and then note probable jurisdiction, and remand this case to the district court for

[13] The *amicus* brief submitted in *Aguilar* on behalf of G. Hugh Wamble, appellee here, stated (at p. 2) that "[a] decision in this action may well have a direct bearing on plaintiff Wamble's suit in Missouri."

further proceedings consistent with the decision in *Aguilar*.

2. At the core of the district court's ruling that the Title I bypass program in Missouri breached the Establishment Clause was its agreement with the Court of Appeals for the Second Circuit in *Aguilar* that several of this Court's decisions have created a *per se* rule prohibiting public school teachers from offering any form of instruction on the premises of church-affiliated schools. Both courts drew that conclusion principally from this Court's decisions in *Meek v. Pittenger*, *supra*, and *Wolman v. Walter*, *supra*. The approach of the district court below and the court of appeals in *Aguilar* conflicts with more recent Establishment Clause decisions of this Court that warn against viewing prior cases in absolutist terms.

In its most recent Establishment Clause decision, this Court observed:

> "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984).

The Court went on to assert rather pointedly: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Id.* Those observations echo the Court's earlier admonition in an educational aid case that "[w]hat is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes." *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980).

This Court's recurrent urging against absolutist approaches and *per se* rules is part of its broader effort in recent cases to assure that its decisions are in harmony

with the historical reasons for the adoption of the Establishment Clause. For example, in *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (1983), the Court quoted with approval from Justice Powell's separate opinion in *Wolman v. Walter*, 433 U.S. at 263:

> "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court."

More recently, in reviewing statements in some cases seeming to suggest that the Establishment Clause mandates total separation of church and state, the Court observed: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 104 S. Ct. at 1359. Such an approach to Establishment Clause issues simply acknowledges that "great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, 103 S. Ct. 3330, 3337 (1983).

Appellants submit that the district court in this case abdicated its responsibility for proper constitutional adjudication by disregarding this Court's recent teachings and resting its decision on an absolutist view of the Establishment Clause and a *per se* rule. In effect, it was unable to distinguish between real threat and mere shadow.

It is true that this Court invalidated in *Meek v. Pittenger*, *supra*, a program that had many of the features

of Title I. However, the auxiliary services program struck down in *Meek* was challenged soon after its enactment, and the case reached this Court with a very meager record of how the program operated. Under those circumstances, the Court in *Meek* focused on the potential problems that could arise from such a program.

There is no justification for such hypothetical analysis in this case, which has an extensive evidentiary record of how the Title I bypass program in Missouri has operated since its inception in 1977. That record discloses that none of the potential problems that concerned this Court in *Meek* has materialized. Under the circumstances, the district court's application of a *per se* rule in this case led it to the wrong result.

3. One consequence of the district court's application of a *per se* rule was that it largely disregarded the extensive evidentiary record developed in this case and its own factual findings, an approach directly in conflict with this Court's decision in *Wheeler v. Barrera*, 417 U.S. 402 (1974).

At issue in *Wheeler* was whether Missouri officials had breached their statutory obligation to provide to private school students Title I services comparable to those provided to public school students. The state officials contended that the only comparable services that would satisfy private school students were on-premises remedial instruction during regular school hours and that such a program in church-affiliated schools would violate the Establishment Clause. This Court rejected that invitation to rule on the constitutionality of an on-premises Title I program, noting that no such program was before it and that "the First Amendment implications [of such a program] may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426.

Clearly, the Court was inviting parties litigating the constitutionality of an on-premises Title I program to

develop an evidentiary record of the program at issue. The defendants in the trial court in this case did exactly as the Court suggested in *Wheeler*, only to have the court disregard that record by deciding the case on the basis of a *per se* rule. Appellants suggest that the district court erred in ignoring the evidentiary record in this case.

The district court compounded that error when, in ruminating on the possible constitutional infirmities of the Missouri on-premises Title I bypass program, it relied on hypothetical and speculative concerns that find no support in the record of this case. That approach is in clear conflict with this Court's decision in *Tilton v. Richardson*, 403 U.S. 672 (1971). There the Court stated pointedly:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U.S. at 679 (plurality opinion).[14]

It was clear error for the district court to base its constitutional ruling on hypothetical concerns that find no support in the extensive evidentiary record in this case.

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[14] More recently, the Court has rejected reliance on hypothetical infringements of claimed First Amendment rights to override application of anti-discrimination laws. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3254-55 (1984).

CONCLUSION

This Court should hold this case in abeyance pending the decision of this Court in *Aguilar v. Felton*. At that time, we request that the Court note probable jurisdiction and remand this case for further proceedings in the district court consistent with this Court's decision in *Aguilar*. In the alternative, we request that the Court note probable jurisdiction and grant a plenary hearing.

Respectfully submitted,

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Dated: February 22, 1985

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0254-CV-W-8

G. HUGH WAMBLE,
Plaintiff,

and

VERLINE COBBINS, *et al.*,
Intervenor-Plaintiffs,

vs.

TERREL H. BELL, Secretary of the United States Department of Education, *et al.*,
Defendants,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Intervenor-Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER

Prologue

This multi-faceted constitutional challenge to a significant federal educational program was first filed in this court in April of 1977. It has made its tortuous way

through three divisions and before as many judges of this court, finally coming to rest in this division in late 1981. Before assignment of the case to this division, discovery and trial preparation proceeded apace until a stay was entered by Judge Collinson on March 30, 1979, pending the outcome of a similar case, *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980) (hereinafter referred to as *Pearl*). *Pearl* was decided on April 18, 1980, the final stay order was lifted, and extensive discovery was conducted from that time until transfer here. The court placed counsel on what was characterized as a "fast track" in late 1981 to complete discovery and trial preparation, and after four and a half years of pendency the case finally came to trial on August 2, 1982. During the next five months the court held twenty-three separate days of trial.

After trial and extensive post-trial briefing there began a series of suggestions by one party or the other that the court delay its decision in the case until the opinions in several cases pending elsewhere were handed down. The last of such cases was *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, —— U.S. —— (1984),[1] and it is now suggested that action by this court should be further delayed pending the Supreme Court's decision in *Felton*, certiorari having been granted on October 1, 1984. While that decision may very well affect the result reached here, the court is convinced that the time has come to rule and

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[1] Judge Friendly of the Second Circuit in *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, —— U.S. —— (1984), provided a chronological discussion of the Supreme Court's relevant decisions with regard to government aid to religious schools. In fact, *Felton* is strikingly similar in its facts and issues to the case at bar and this court finds Judge Friendly's exposition of the development of the law to be thorough and persuasive. We, therefore, adopt his analysis, limiting this discussion to the law as it relates to the facts before us.

let this decision assume its proper role in this on-going drama.

Introduction

Before the court is an Establishment Clause challenge to federal legislation, Title I of the Elementary and Education Act of 1965, 20 U.S.C. § 2701 *et seq.* (hereinafter Title I), designed to provide remedial education services for public and nonpublic school children who reside in low-income areas and whose scholastic or testing records demonstrate a need for such services. This action was originally brought by Dr. Hugh Wamble, an individual taxpayer. Thirty-two other taxpayers and seven parents of public school students entitled to receive Title I assistance later were permitted to intervene as plaintiffs (hereinafter with Dr. Wamble jointly referred to as plaintiffs unless otherwise specified) against the defendants named by Dr. Wamble, to wit: the Secretary of the United States Department of Education (hereinafter USDOE or the Secretary),[2] Blue Hills Home Corporation (hereinafter BHHC), the entity contracting with USDOE to provide Title I services for Missouri's nonpublic school students, and BHHC's Executive Director John P. Cole. Thirteen parents of students in religiously affiliated schools were permitted to intervene as defendants (hereinafter with the originally named defendants jointly referred to as defendants unless otherwise specified). Jurisdiction is appropriately invoked pursuant to 28 U.S.C. §§ 1331, 1391, 2201, and 2202.

Plaintiffs challenge the Secretary's decision to invoke the "bypass provision" of the Act in question, 20 U.S.C. § 3806(b), which authorizes payment of funds to an in-

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[2] Prior to the May, 1980, creation of the Department of Education, the Commissioner of the United States Office of Education administered Title I. Because this case was filed prior to the existence of the Department of Education, the court could have referred to the Title I administrator at the federal level as either the Secretary or the Commissioner.

dependent contractor who provides services in parochial schools in jurisdictions where the public education authority either will not or cannot administer the funds in parochial schools. Plaintiffs condemn the contractor, BHHC, as a religiously affiliated and controlled organization, seek to enjoin permanently the operation of Title I in Missouri's nonpublic schools and request a declaratory judgment that the bypass statute on its face and as administered violates the First Amendment prohibition against establishment of religion.

Specifically, this case presents two fundamental questions: (1) Does this federal statute which authorizes the payment of funds to an independent contractor with directions to that contractor to provide remedial services for educationally deprived children residing in low-income areas and attending nonpublic schools, the majority of which are church-affiliated, on its face violate the Establishment Clause of the First Amendment to the United States Constitution? (2) Assuming *arguendo*, that Title I is not unconstitutional on its face, does Title I as administered on the premises of Missouri's parochial schools during the school day in rooms largely devoid of religious symbols by teachers paid and supervised by this independent contractor, nevertheless violate the religious neutrality and entanglement principles enunciated in *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) and *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975)? After waiting for and studying opinions from other jurisdictions involving similar questions and upon careful review of the record made in this twenty-three day trial, this court answers the first question in the negative and the second question in the affirmative.

Background

Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (codified as amended 20 U.S.C. § 2701 *et seq.*) for the express purpose of funding locally administered com-

pensatory learning programs—remedial education to benefit *all* educationally deprived children residing in low-income areas. *See* S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] United States Code Cong. and Ad. News, pp. 1446, 1450. The Secretary administers Title I at the federal level, state educational agencies (SEA) normally implement it, and local educational agencies (LEA) customarily operate and manage the program on a day-to-day basis. 20 U.S.C. § 380 (West Supp. 1982).

All students who are educationally deprived, defined as below age-level in academic performance, and who reside in a low-income area are eligible to participate in a Title I program, 20 U.S.C. §§ 2722, 3804, 3805, 3806. To receive federal funds to finance Title I programs for children in parochial schools, an SEA must file an assurance with the Secretary that a nonsectarian agency will control the funds and that the SEA will assure proper disbursement of funds through fiscal control. 20 U.S.C. § 3876(a). The related LEAs in turn file with the SEA applications describing the project and assuring the SEA that it will provide for equitable participation of all eligible children in the area regardless of whether they attend public or nonpublic schools. 20 U.S.C. § 3805(a) and (b). *See also* 20 U.S.C. §§ 2740; 3806(a), (b); 47 Fed. Reg. 52, 350 (1982) (to be codified at 34 C.F.R. § 200.70). Each LEA is responsible for insuring that the needs of nonpublic and public school children are met on a basis comparable in quality, scope, and opportunity, and that expenditures are equal.[a] 20 U.S.C. §§ 2740(a); 3806; 47 Fed. Reg. 52,350. In addition, Title I mandates that instruction supplement, not supplant, regular classroom instruction, 20 U.S.C. § 3807(b), and that "[n]othing in [Title I or its revised version effective October 1, 1982, Chapter I, 20 U.S.C. § 3801 *et seq.*] shall be construed

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[a] The "equal expenditure" requirement became a part of the statute in the 1978 amendments to Title I found in Pub. L. No. 95-561, 92 Stat. 2153 (codified at 20 U.S.C. § 2740(a)).

to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384.

Early Title I benefits for nonpublic school children in Missouri consisted of equipment and materials without instruction while public school children received on-site remedial instruction in reading, math, and verbal arts. In *Barrera v. Wheeler*, 475 F.2d 1338, 1353 (8th Cir. 1973), the Eighth Circuit held that the Missouri Commission of Education and the Missouri Board of Education failed to provide comparable services to both public and nonpublic school children.[4] Pending appeal to the Supreme Court, the Honorable William R. Collinson of this district issued an injunction ordering the LEAs to provide comparable services to nonpublic school children —remedial instruction in the nonpublic schools by public teachers during the regular school day. During the 1973-74 and 1974-75 school years, eligible children were released from their regular classes to attend a separate Title I class, known as "pull-out,"—which supplemented rather than supplanted regular instruction.

In 1974, the Supreme Court affirmed the Eighth Circuit, holding that the services provided to the nonpublic school students "were plainly inferior, both qualitatively and quantitatively." *Wheeler v. Barrera*, 417 U.S. 402, 415, 94 S. Ct. 2274, 2282, 41 L. Ed. 2d 159 (1974). The court declined, however, to decide whether Title I's mandate for "equitable participation" was a requirement of on-premise instruction or whether such on-premise instruction would be constitutional. Instead, it remanded

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[4] The history of litigation over Title I in Missouri is well-documented. During the 1970's, the court in *Barrera v. Wheeler*, 531 F.2d 402 (8th Cir. 1976) referred to the "apparently endless legal battle" over this statutory program. Questions about Title I have been addressed in *Barrera v. Wheeler*, 441 F.2d 795 (8th Cir. 1971); *Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973); *Wheeler v. Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

the case to Judge Collinson to develop guidelines designed to assure LEA compliance in Missouri with Title I.

Later in 1974, Congress amended Title I to remedy inequities allegedly found in Missouri and elsewhere caused by state or local laws which prohibited state agencies from offering equitable participation to eligible nonpublic school children. It authorized the Secretary in such a circumstance to *bypass* state and local authorities and to provide Title I services directly to educationally deprived nonpublic school children through the use of independent contractors unrelated to state or local governmental agencies.[5] Pub. L. No. 93-380, 88 Stat. 484 (originally codified at 20 U.S.C. § 241e-1 (1976)); 20 U.S.C. §§ 2740(b), 3806(b).

In Missouri, the Secretary initially took no steps to implement a bypass program. USDOE viewed the services required for nonpublic school students under Judge Collinson's injunction as comparable to those provided for public school students. On remand in 1975, however, Judge Collinson dissolved the injunction and accepted the Missouri SEA's plan to approve LEA applications, a plan providing for equitable expenditures but otherwise failing to ensure a program for nonpublic school children comparable in size, scope, or opportunity to the program offered to public school children. *Barrera v. Wheeler*, 531 F.2d 402, 406-07 (8th Cir. 1976). For nonpublic school children, LEA applications provided for instruction given on the premises of *public* schools before or after regular school hours or on Saturday. Public school children continued to receive "pull-out" instruction on-premises during the school day. For a variety of reasons not unrelated to parent, pupil and school administration reaction to off-premise instruction (*see* p. 10

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[5] The costs of the bypass services, including any administrative costs, are deducted from the funds made available to the LEAs and SEAs in the affected area. 20 U.S.C. § 3806(b)(3)(A); 34 C.F.R. 20195(c).

infra), the number of private school children accepting the offered service dropped to one-half the number previously served under the Collinson injunction.

In 1976, representatives of parochial schools in Missouri asked the Secretary to consider a bypass of the state and local educational agencies. This request followed a decision by Missouri Commission of Education that administration of an on-premises program by the state with public funds provided by the USDOE violated the Missouri Constitution.[6] A USDOE investigating team then reviewed the statistics demonstrating the number of pupils participating, studied the LEA project applications and met with state and local staff as well as parents. It investigated accusations that the decline in participation in the off-premises program was caused by a parochial school boycott. After a thorough investigation, the team concluded that the poor attendance was due to student and teacher fatigue, conflicts with after school activities, late home arrival, parental concern for

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[6] The Director of Governmental Programs for the Archdiocese of St. Louis suggested a form letter for use by parochial school administrators in protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools; the SEA received a "substantial amount of mail" from parochial school principals and parents of parochial school students, the "great majority of which related to the provision of Title I services in private schools during the school day," Tr. II at 17-18; and certain parochial school administrators of Catholic and Lutheran schools in Missouri wrote a letter to USDOE seeking the invocation of the bypass because of their belief that the programs offered to nonpublic school students were not comparable to those being offered to public school students. The letter was jointly signed by various superintendents.

Dr. Wamble, on the letterhead of the Missouri Baptist Convention and in his capacity as president of the convention also wrote a letter. In contrast to the position of the parochial school administrators, he encouraged Senator Eagleton to vote "no" on the then-*proposed* amendment and, in defining his support, he noted the size of the convention (1,840 churches with reported membership of 555,000) and the convention's long-standing opposition to tax support of education in church-related schools.

safety, students' conception that the after hours program was punishment, and conflicts with family obligations. Poor attendance was *not* due to a boycott. In addition, the team found that 31.2 percent of the Title I budget for nonpublic schools was spent on teachers' salaries and 40 percent was spent on non-instructional costs such as transportation and facilities rental. In stark contrast, 72.8 percent of funds in the public schools was applied to teachers' salaries.

On July 22, 1976, following this investigation, the Secretary concluded, pursuant to 20 U.S.C. § 3806(b)(2) of the bypass provision, that the four LEAs investigated "substantially failed to provide for the participation on an equitable basis . . . and the establishment of a 'bypass arrangement' to provide services . . . [was] warranted." *Plaintiffs' Exhibit No. 304.* This decision followed a September, 1975 Jackson County, Missouri circuit court ruling which affirmed the prior position of the State Board of Education that Missouri's constitution prohibits state involvement in the use of Title I funds for instruction given on the premises of parochial schools, a decision repeated by the Missouri Supreme Court on December 30, 1976, in *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

After soliciting bids on three proposed bypass projects in Missouri, USDOE, on February 14, 1977, awarded contracts for three areas to BHHC. A fourth contract was awarded to BHHC on October 1, 1977 and, by the end of the 1979-80 school year, USDOE had consolidated its award for statewide nonpublic school Title I services under one contract with BHHC, bypassing fifty-three Missouri LEAs. This contract expired July 31, 1982. Under properly established contract procurement procedures, it was again awarded to BHHC for the 1982-83 school year.

Plaintiffs challenge the program in Missouri, alleging that BHHC is a religiously affiliated and controlled or-

ganization which, by receiving funds directly from the federal government for use in religiously affiliated schools, blatantly violates the prohibition against establishment of religion. This court agrees that at the time the initial consolidated award was made for the bypass program in Missouri, BHHC appeared to be a religiously affiliated organization even though its articles of incorporation, by-laws, and express purposes were entirely neutral. BHHC was incorporated on July 19, 1974, as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert. It originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were persons known to BHHC through their common affiliation with the parochial schools.

By the time BHHC was awarded a second state-wide contract, it had changed its apparent character and become ostensibly neutral. In 1979, the organization moved from the buildings owned by St. Therese Church to a commercially owned mall. Further, its new board members were not predominantly Catholic, and it deliberately avoided questioning prospective teachers about their religious affiliation. Consequently, the court finds that teachers were not purposely placed in a school which matched their chosen religion. This finding is corroborated by the evidence which shows only an incidental overlap in this representation. Indeed, seventy-nine percent of the BHHC teachers were assigned to schools with religious affiliations different from their own. Finally, while plaintiffs argue that the executive director of BHHC, John Cole, a former Catholic priest, was offered the job because he attended seminary with Father Rotert, an incorporator, the evidence reflects and this court finds that his religious affiliation is not the primary reason he was hired. Other factors in his hiring were his life-long friendship with Rotert, his experience as a former USDOE employee, and the fact that he possessed "capa-

bilities considerably beyond anyone else that [Rotert] could possibly hire for the job." Tr. III at 27-28.

The bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations. USDOE requires BHHC to submit a Program Design on June 1 of each year which, when approved by USDOE, is the contractual basis for BHHC's obligation to provide Title I services the following year. No funds flow to the nonpublic school authorities.

In this case, the Program Design states that BHHC must provide services comparable to services provided by an LEA at the public school and it establishes procedures to compare costs, selection, criteria, and the scope of the two programs. The educational services are provided *on site* at the parochial schools during regular hours. The services include supplemental instruction in remedial reading, mathematics, and language arts for educationally deprived children residing in low-income areas and enrolled in nonpublic schools, the majority of which are sectarian. The contract requires staff orientation and in-service training, supervision and monitoring of staff, coordination of services and consultation with the classroom teacher, selection of materials to fit the needs of students, assurance that materials are used only for Title I purposes, communication with parents, and remedial instruction based upon the individual needs.

BHHC takes steps to ensure its own religious neutrality and tries, sometimes without success, to ensure that the teachers and classrooms are neutral. BHHC supervisors inspect instructional facilities to make sure that the sites are adequate and free of religious artifacts. All teachers are monitored and trained solely by BHHC supervisors. Orientation sessions include oral instructions designed to ensure religious neutrality,[7] and the 1982-83,

[7] Oral instructions include 1) that the teachers are accountable only to BHHC supervisors and are not subject to the supervision

"Chapter I Handbook" affirms that "BHHC must manage the instructional program separate from the nonpublic schools to insure . . . 'noninvolvement' and 'nonentanglement' . . . ." *Defendants' Exhibit 53* at 21.

Nonpublic school personnel exercise no control over the program, the teachers, or the Title I curricula. The Title I teachers indicate that they, like public school teachers, refrain from religious discussion and instruct students who bring up related topics to discuss them with appropriate personnel. Title I materials are used only for Title I purposes. However, nonpublic school *students* are ultimately under the supervision of nonpublic school administrators, and federal monitoring often *excludes* inquiries about religious neutrality.

Administrative involvement of the federal government or BHHC with the private school personnel can be divided into three general categories: (1) contact for the purposes of planning or scheduling; (2) consultation regarding the educational progress of Title I students; and (3) contact necessary to monitor the administration of the Title I program. The contacts necessary to plan and schedule the Title I program on-premises include identification of the Title I facility within each school, identifi-

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or control of nonpublic school personnel; 2) that they are assigned to the nonpublic school solely to provide services to those students meeting the eligibility criteria and that they alone are responsible for the selection of those students; 3) that they are to consult with nonpublic school teachers and administrators about the educational needs of the students; 4) that they must assure that materials and equipment procured for Title I contain no religious content and are not used in the nonpublic school curriculum; 5) that they are not to engage in teaching or other cooperative instructional activities with nonpublic school teachers; 6) they are not to become involved with the religious activities of the nonpublic schools in any way except to attend faculty or parent-teacher meetings to explain Title I; 7) that they are not to introduce or allow any religious discussion with any nonpublic school personnel; and 9) that they are to maintain the Title I classroom free of religious symbols.

cation of students eligible to receive Title I, scheduling of private school classes with the Title I classes, verification that Title I supplements and does not supplant the private schools, planning of curricula, and attendance by Title I personnel at faculty and parent-teacher meetings to explain the program. In addition, Title I personnel and regular nonpublic school teachers meet to discuss the children's educational needs and progress, and BHHC personnel contact the private school administrators to secure the removal of any visible religious symbols or, occasionally, to discuss discipline problems.

Beginning in 1980, USDOE required BHHC to obtain from nonpublic school officials an assurance of suitable facilities and, in 1981, *written* assurances that the settings were religiously neutral. However, USDOE did not define for BHHC the term "religiously neutral." BHHC, in turn, did not define the term for the school principals.

The classrooms, while generally reserved for the exclusive *use* of the Title I teachers, are otherwise controlled by the school. Some are rooms located within larger partitioned rooms and some are used by the school for purposes other than Title I activities when Title I classes are not being held. Many Title I rooms are identified by signs which identify them as Title I rooms, but the evidence does not indicate that these signs include notice that Title I is operated and controlled by USDOE and BHHC.

While many BHHC teachers have never seen a religious symbol inside a Title I classroom, religious symbols were found on some fifteen occasions mentioned in the evidence in the trial of this case. Most of the objects were promptly removed or covered, if nonremovable, upon their discovery. In one instance, however, removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Further, the evi-

dence indicates that other incidents *may* have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the "school level." Finally, while the bypass teachers and supervisors are aware of religious symbols elsewhere in the buildings, none believe that their presence influences them or their instruction.

The Catholic elementary schools are subject to the jurisdiction, control, and authority of the Diocese, Archdiocese, and Parish in which they are located. The Lutheran elementary schools are subject to the control of their sponsoring congregations. These religiously affiliated schools have two goals—one is to "teach the youngsters about God and faith in God," and the other is to "develop all of the academic programs, the secular subjects, as professionally as possible." Tr. XVIII at 42.

Catholic principals generally prefer to hire Catholic teachers. However, several employ persons of other faiths so long as the teacher agrees to contribute to both the religious and educational objectives of the school. Tr. XVIII at 157. Lutheran school administrators, with few exceptions, hire members of the Lutheran Church-Missouri Synod. Lutheran teachers are "expected to present their lessons from a Christian viewpoint." *See, e.g., Eckhoff Deposition, March 15, 1982* at 106. Catholic school teachers are expected to avoid advocating positions contrary to the Church's teachings. One Archdiocesan handbook contains a specific prohibition against the use of Planned Parenthood materials and speakers.

Preference policies for admission, while they exist, have not resulted in the actual exclusion of non-affiliated students in either Catholic or Lutheran schools. Most of these schools have significant numbers of students who are non-Catholic or non-Lutheran.

There is no way of knowing whether the absence of Title I would result in a greater decline in enrollment

than that already experienced by nonpublic schools, there being no specific evidence that parents select schools for their children where Title I is available. Because eligibility must be determined by the teacher, it appears that few parents would know at the time of application that their child is Title I eligible.

In most of the schools, thirty to forty-five minutes per day is spent on religious instruction. Religion class in the Catholic schools, while it may include instruction about other denominations, "is geared toward the Catholic religion," and emphasizes Christian living, moral values and Bible studies. Tr. XVIII at 61. Lutheran schools similarly strive "to bring the child in touch with the Word of God" . . . "so that the Holy Spirit may work a stronger faith" and so that he may become a "Christian leader." *Plaintiff's Exhibit No. 1260. See also Eckhoff Deposition, March 15, 1982* at 18, 42. With few exceptions, students are required to study, but *not* to accept or to obey the doctrines of the sponsoring church. Teachers in secular classes are encouraged to promote Catholic or Christian values through "values discussions."

The schools regularly schedule religious service or activities, like prayer, during the day, and conduct religious holiday activities. Attendance at religious activities is mandatory in some schools, but not in others. The students are visited regularly by members of the clergy and, in at least one Lutheran school, teachers ask students on Monday whether they attended church on Sunday. In summary, these religiously affiliated schools are an "integral part of the religious mission of the sponsoring church." [8]

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[8] Two quotes illustrate and reinforce this court's finding that the Catholic and Lutheran schools at issue are "an integral part of the religious mission of the sponsoring church" as well as a conduit for secular education. In "Human Rights," a publication of the Commission on Human Rights of the Archdiocese of St.

Legal Discussion

Plaintiffs make three challenges which may be disposed of at the outset of this discussion.

(1) First, plaintiffs argue that Title I is unconstitutional on its face. The Supreme Court has not held that Title I *requires* on-premise instruction. *Wheeler v. Barrera*, 417 U.S. 402, 418, 94 S. Ct. 2274, 2284, 41 L. Ed. 2d 159 (1974). Government subsidized off-premise remedial instruction for nonpublic schools has been held constitutional in *Wolman v. Walters*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977). The court has reviewed the bypass amendment and finds that, on its face, it presents no further constitutional impediment to administration of the statute than was presented in *Wheeler*. In this court's opinion, Title I is facially valid because it

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Louis in January, 1978, is an article, "Catholic Church and Its Schools," which states, in part:

> Catholic schools provide the Church an effective way of helping families form young people in value of the gospel. Fr. Andrew Greeley of the University of Chicago has demonstrated that the Catholic school is the most effective instrument for forming young people. In its task of explaining the gospel and helping the young experience it, the Catholic school provides students whose members openly profess their faith, and the peer influence of young people who share a belief in God. It offers time for prayer, the sacraments, and a daily religion class. . . . The Church in many ways, including through its schools, proclaims that the presence of God in all segments of a persons' life is the single most important value of all.

(Plaintiffs' Exhibit No. 1297). The Handbook of Trinity Lutheran School of St. Louis similarly explains:

> It is the responsibility of parents to teach the truths of God's Word to their children because the Bible commands parents to "bring up their children in the nurture and admonition of the Lord." God has also commanded the Church to "teach all nations to observe all things commanded by God." The Lutheran School exists mainly for the purpose of assisting both parents and the Church in meeting these responsibilities.

(Plaintiffs' Exhibit No. 943, p. 1).

may be administered within the confines of the Constitution. *See City Council of Los Angeles v. Taxpayers for Vincent*, —— U.S. ——, 104 S. Ct. 2118, 2124, 80 L. Ed. 2d 772 (1984).

(2) Plaintiffs also challenge the Secretary's decision to invoke the bypass in Missouri. This court finds that the Secretary, in making his decision, acted rationally and within the scope of his authority. His decision was supported by a history of imbalanced Title I services for Missouri's nonpublic school students, by substantial evidence gathered by the USDOE investigating team and by a consideration of the relevant facts. *See Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981). Further, it was necessitated by Missouri law. *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976) (en banc).

(3) Finally, plaintiffs attack the character of BHHC. While the religious affiliation of government employees, officers, or contractors in most circumstances is irrelevant and in no way offends the Constitution, *see, e.g., McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978), this court notes in this case that the use of a religiously affiliated organization staffed exclusively at the inception of the program by people who were in one way or another affiliated with the Catholic Church, to implement a federally funded program in religiously affiliated schools, flew in the face of Congressional intent and violated the Establishment Clause. Congress intended to substitute a religiously *neutral* organization for SEA-LEA agencies whose operations were prohibited by local or state law. Implementation, management, and supervision of the program by a puppet of the Church, however well-intentioned, is tantamount to direct fiscal government aid to religiously affiliated schools. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 9 L. Ed. 2d 745 (1971). However, plaintiffs' challenge to the original contract award was rendered moot by the ex-

piration of the initial contract,[9] and, because BHHC was aware of its error long before the award of the second contract, it dramatically changed the composition of its staff and Board of Directors, transforming BHHC into what was ostensibly an entirely neutral organization.

Administration of the On-Premise Program

The First Amendment to the Constitution of the United States provides in its first clause: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." This provision, the Establishment Clause, historically has served two purposes. It worked to prevent the federal government from establishing one church, and it prohibited aid or preferential treatment to a particular denomination. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. and Lee L. Rev. 347, 362-63 (1984). The Establishment Clause accounted for the concerns of a dominant federalism, reserving for the states the authority to deal with religious matters.[10] It "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Abington School District v. Schempp*, 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844, citing *Engel v. Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 1267, 8 L. Ed. 2d 601 (1963). A church

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[9] Thus, this court need not reach the issue of whether plaintiffs have standing to challenge the award to BHHC. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 100 (1982).

[10] The First Amendment, like the entire Bill of Rights, initially served to limit only the federal government. In 1940, the Supreme Court incorporated the First Amendment into the Fourteenth Amendment and extended its application to the various states. *Everson v. Board of Education*, 330 U.S. 1, 13, 67 S. Ct. 504, 510, 91 L. Ed. 711 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 2d 1213 (1940).

unduly involved with government might be subverted to redirect its programs to meet ends chosen by government. The church would be compromised in its efforts to act in accordance with its higher calling. *Id.*

In extending Title I in a nondiscriminatory manner to religiously affiliated schools, courts recognize the parallel goals of Congress, individual states, and particular institutions to educate all students within the confines of the existing economic structure. The "State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 797, 93 S. Ct. 2955, 2978, 37 L. Ed. 2d 948 (1973). The parents of parochial school children, electing by reason of their convictions to send their children to these schools, nevertheless pay taxes for public education and, therefore, have historically sought some measure of public support to enhance the quality of education for their children or at least to make it comparable to that received by public school children. This is the case here where public funds have been appropriated to provide remedial instruction for the educationally deprived.

At least to the extent that such remedial instruction might be provided by public school teachers to parochial school children off the premises of the parochial schools, the Supreme Court has succumbed to these intertwined economic and educational goals, stating, "Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433 U.S. at 247, n.14. Accordingly, the Supreme Court, through its interpretations of what is constitutionally permissible, has sanctioned various forms of government aid to parochial schools, aid which requires increasing allotments of tax

money to parochial schools and which fosters increasing church school dependence on the federal government. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 797-98.

To maintain flexibility while preserving the cherished safeguard of the Establishment Clause, the Court has steered away from a "legalistic minuet in which precise rules and forms must govern." *Lemon v. Kurtzman* (and its companion *Earley v. DiCenso*), 403 U.S. 602, 614, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971). The line of separation between church and state is, according to the Court, necessarily maintained as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Id.* Aid to private church-affiliated colleges is upheld because these higher institutions are "less likely" to inculcate religious values than their "pervasively sectarian" elementary and secondary school counterparts. "This reduces the risk that government aid will in fact serve to support religious activities." *Tilton v. Richardson*, 403 U.S. 672, 687, 91 S. Ct. 2091, 2100, 29 L. Ed. 2d 790 (1971). Aid to elementary schools in the form of *off-premise* remedial instruction has been upheld because the entanglement is not "excessive," *Wolman v. Walter*, 433 U.S. 229 (1977), and aid in the form of textbooks is permissible because its "primary" effect is not to foster religion but to promote the secular education of all children, regardless of their religion. *Board of Education v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). "That religion may indirectly benefit from governmental aid to the sectarian activities of churches does not convert that aid into an impermissible establishment of religion." *Lemon v. Kurtzman*, 403 U.S. at 664 (White, J., concurring).

At apparent odds with the blurred barriers or standards set by the Court is the Constitution's admonition that Congress shall make no law "respecting" the establishment of religion—that is, a law which could "lead" to

the establishment of a state church or state religion or a law which the Supreme Court considers to be "step" in that direction. *Lemon v. Kurtzman*, 403 U.S. at 612, 624.

The "danger" or "risk" that certain forms of governmental aid can be diverted to religious use in some cases is sufficient to preclude that aid. *See, e.g., Wolman v. Walter*, 433 U.S. at 250. With respect to other forms of governmental aid, such as remedial instruction, the "danger" creates a need for the government perpetually to monitor the aid to ensure its ultimate neutrality and to guarantee that the aid is not used to foster religion.[11] This necessity for surveillance in turn creates the "potential" or "possibility" of excessive entanglement. *Meek v. Pittenger*, 421 U.S. 349, 372, 95 S. Ct. 1753, 1766, 44 L. Ed. 2d 217 (1975). Even aid which creates a mere "diminished probability" of impermissible use does not pass constitutional muster. *Id.* at 370-71. Thus plaintiffs in actions such as this need demonstrate only an *unacceptable risk* of constitutional harm, not actual prejudice. With respect to subsidized teachers, "the State must be *certain*, given the Religion Clauses, that [they] do not inculcate religion." *Meek v. Pittenger*, 421 U.S. at 371, quoting *Earley v. DiCenso*, 403 U.S. at 619 (emphasis added).

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[11] In *Felton*, the court noted that taxpayers interested in the preservation of the Establishment Clause "cannot reasonably be expected to mount perpetual guard." Further, the court stated, "In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy. . . . [T]here could be no greater step away from the goal of *reasonable certainty* than to adopt a rule that the validity of a program should hinge on its precise workings from year to year." *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48 (1984), *cert. granted*, —— U.S. —— (1984).

In summary, the Supreme Court since 1971 has justified various forms of aid to religiously affiliated schools first, by avoiding a ritualistic or literal quest for the advice of the Founding Fathers with its blurred barriers, and second, by determining that the challenged practices do not even tend to promote the type of interdependence between religion and state which the First Amendment was designed to prevent.

The Court has advanced three tests for use in analyzing Establishment Clause challenges to statutes providing aid for parochial school children; all must be passed for the statute to survive the challenge. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman* (and its companion *Earley v. DiCenso*), 403 U.S. at 612-13.

A. *Secular Legislative Purpose*

The express purpose of Title I is to provide remedial education for all educationally deprived children meeting certain criteria of need, regardless of whether they attend a religiously affiliated school or a public one. Plaintiffs do not suggest that the enactment of Title I was motivated by an improper purpose. It serves a purely secular and nondiscriminatory legislative end unassociated with the Church's separate goal to advance religion. The statute on its face and as administered satisfies the first test.

B. *Primary Effect*

Regardless of the permissible nature of its purpose, in order for this court to hold that a statute providing aid to religiously affiliated schools, as administered, neither advances nor inhibits religion, the aid must be identifiable and separable from assistance to sectarian activities.

See Wolman v. Walter, 433 U.S. at 250; *Committee for Public Education of Religious Liberty v. Nyquist*, 413 U.S. at 782. Additionally, the aid must primarily benefit the child or student rather than the sectarian institution. *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 2d 71 (1947). While it is undisputed that aid in the form of textbooks, transportation, and certain diagnostic services ultimately results in financial support for the collective enterprise of sectarian institutions, the Court has determined that this support is a mere by-product of aid which primarily benefits the child. *Id.* In contrast, aid has a primary effect of advancing religion when it flows directly to pervasively sectarian institutions or when it funds a specifically religious activity in an otherwise secular setting. *Hunt v. McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 2874, 37 L. Ed. 2d 923 (1973). *See also Wolman v. Walter*, 433 U.S. at 251 (invalidating loan for instructional material and equipment because it "inescapably" had the improper primary effect of advancing the sectarian enterprise).

The present case involves remedial aid provided by teachers paid and supervised by a tax-supported non-religious entity, BHHC, authorized by a statute which on its face provides that it shall not "be construed to authorize the making of any payment under this chapter for religious worship or instruction." 20 U.S.C. § 3384. In fact, there is no evidence that any BHHC teacher has advanced religious ideologies in accomplishing Title I instruction. The Supreme Court, in *Wolman*, upheld such aid *off-premises*, finding that the aid did not have a primary effect which advanced religion. 433 U.S. at 248. Implicit in this finding is the conclusion that the aid was identifiable and separable from assistance to sectarian activities, and that it primarily benefited the student.

In the present case, the instruction takes place *on-premises* in a room only sometimes identified as the "Title I room." Title I instruction supplements rather than sup-

plants other instruction, thus maximizing the benefit to students who would otherwise receive no such instruction and minimizing the benefit to the school as a whole. Thus, plaintiffs contend that the location of instruction does not alter the primary effect of Missouri's Title I program.

This court is prepared to accept the conclusion that in the administration of this program the nonpublic schools are not relieved of any financial responsibility. However, this court recognizes that plaintiffs' conclusion—that the location does not alter the primary effect—is difficult to prove to a "certainty" because, while the evidence in this case was extensive, the surveillance over the teachers was not. Sectarian ideologies, encouraged in a pervasively sectarian institution, may be introduced through subtle references. While the location does not diminish the benefit to children, it renders it more difficult to "identify and separate" the functions of Title I instruction or to ascertain whether the aid has a direct rather than incidental or an immediate rather than remote effect of advancing religion.

Substantial aid to the education of parochial school children necessarily results in some aid to the sectarian enterprise as a whole, *Wolman v. Walter*, 433 U.S. at 250, and a law found to have a legitimate "primary" effect to benefit children is not immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 789, n.39. This court concurs with *Nyquist*. "We do not think that such metaphysical judgments are either possible or necessary" under the circumstances of this case. 413 U.S. at 738, n.39. *See also Felton v. Secretary, United States Dep't. of Educ.*, 739 F. 2d at 69-70.

C. *Excessive Entanglement*

To prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of

the other," *Lemon v. Kurtzman*, 403 U.S. at 614, the Court devised a third standard which demands that the program avoid "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414, 25 L. Ed. 2d 697 (1970). The test of "excessive entanglement" is "inescapably one of degree." *Id.*

To determine whether the statute or its administration fosters "excessive entanglement" between the church and the government, the court must examine the character and purposes of the institutions that are benefited. *Lemon v. Kurtzman*, 403 U.S. at 615. If an institution is "pervasively sectarian," *Meek v. Pittenger*, 421 U.S. 349 (1975), or indistinguishable from one that is, *Wolman v. Walters*, 433 U.S. 229 (1977), the court must examine the nature of the aid that the State provides, the resulting relationship between the government and the religious authorities, and the potential for "political divisiveness" created by the program. *See Lemon v. Kurtzman*, 403 U.S. at 615.

To determine whether a school is pervasively sectarian and, therefore, subject to strict Establishment Clause limitations, the Supreme Court has adopted the following guidelines: (1) Is it *controlled* by a church or religious organization? (2) Is its *purpose* to teach, propogate, and promote a particular religious faith and to inculcate religious values? (3) Does it *conduct* its programs to fulfill that purpose? (4) Are there religious *restrictions* on admissions of students or on faculty appointments? (5) Does it *require instruction* in religious doctrine and impose religious restrictions on what the faculty may teach? (6) Does it *require attendance* at or participation in religious worship? (7) Is the school an *integral part* of the mission of the church? *Meek v. Pittenger*, 421 U.S. at 356.

This court encounters no difficulty in finding on the basis of the record made here that the religiously affiliated

elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis. While all of the schools in question here do not possess all the characteristics found in *Meek*, they are essentially schools in which education is an integral part of the dominant sectarian mission of the church and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained. *Meek v. Pittenger*, 421 U.S. at 371. In determining whether the Establishment Clause is at issue, this court has not engaged in a school by school, year by year analysis. To ensure that *each* school each year was not "pervasively sectarian" would require extensive revision of the existing structures and extensive government restrictions. Such surveillance would entail even greater entanglement than that found here and would obviously offend the Establishment Clause. In like manner, an analysis of the character of each school is not required by the Establishment Clause. *See Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 68.

Unlike *Tilton v. Richardson*, 403 U.S. 672 (1972), in which the aid was a "one-shot" allocation of funds for college buildings, the Title I program requires continuing allocations based on the number of children served and subject to inflation and escalating needs. The need for annual appropriations and the knowledge "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 797-98, led the Court, first in *Lemon*, to consider the "potential for political divisiveness" in its discussion of "excessive entanglement." 403 U.S. at 622-25. In *Nyquist*, the Court noted, "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored." 413 U.S. at 797-

98. In *Meek*, the Court again discussed political divisiveness, holding that political fragmentation along religious lines, *together* with administrative entanglement necessary to insure services in church-related schools are strictly neutral and nonideological "compels the conclusion that [the state statute] violates the constitutional prohibition against laws 'respecting an establishment of religion.'" 421 U.S. at 372. Political divisiveness is evidenced in Missouri, not only through efforts to increase or decrease annual appropriations, but through a history of continuing litigation, through the persistent indignation of plaintiffs, including Hugh Wamble of the Southern Baptist Convention, and through the disputes which occur between church factions, some of which would not agree to the removal of church symbols in Title I rooms or the total relinquishment of control to a federally funded corporation.

In pervasively sectarian elementary and secondary schools, the risk of indoctrination or the process of inculcating religious doctrine is enhanced because the children are at an impressionable age.[12] *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 616. The correspondingly high risk of indoctrination requires this court to scrutinize closely the nature of the aid and the relationship between the government and the religious authorities.

In this case, the nature of the aid is on-premise remedial instruction by government subsidized teachers. Government subsidization of Title I instruction in Missouri is unlike any other form of government controlled aid because it directly involves teachers placed on the premises

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[12] Distinguishable are those cases where the Court has upheld aid to religiously affiliated colleges because college students are less impressionable, because religious indoctrination is not a substantial purpose or activity, because there is less likelihood that religion will permeate the secular advocation, and, therefore, because the schools are not pervasively sectarian for purposes of constitutional analysis. *Tilton v. Richardson*, 403 U.S. 672 (1972).

of the pervasively sectarian environment. First, teachers are peculiarly susceptible to influence by their environment. *Wolman v. Walter*, 433 U.S. at 247. Second, unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views. *Id.* Third, a teacher's handling of a subject is unpredictable. Because instruction, unlike the content of a textbook, inherently varies from teacher to teacher in content and emphasis, there is a great potential for involving in that content some aspect of faith or morals. *Lemon v. Kurtzman*, 403 U.S. at 617.

Because this is so, the task of this court is to ascertain whether, without excessive entanglement, the "state [can] be certain, given the Religion Clause, that subsidized teachers do not inculcate religion" when placed on the premises of pervasively sectarian institutions, albeit in rooms largely devoid of religious symbols. *Meek v. Pittenger*, 421 U.S. at 370-71. Because it is required that the state be "certain," it cannot place reliance "on the subjective good faith and professionalism of sectarian teachers." *Id.* at 369. The fact that BHHC's Title I instructors in this case assert that environmental pressures do not influence their work and that religious views are not conveyed to the students is insufficient to diminish significantly the risk or danger of unconstitutional indoctrination. Thus, the state becomes obligated to perform a nearly impossible task, the task of reviewing both the content and the total environment of instruction to determine that whatever is transmitted adheres to the restrictions imposed by the statute and by the Constitution.

Meek and *Wolman* indicate that the supervision, while it is by government-paid authorities over government-paid and supervised teachers, is not significantly distinct from the continuing surveillance required over religiously controlled teachers, *unless* the facilities themselves are reli-

giously neutral. *Wolman v. Walter*, 433 U.S. at 247; *Meek v. Pittenger*, 421 U.S. at 371-72. Influence on a therapist's behavior can be exerted either by the fact that he serves a sectarian administrator or the fact that he operates under the pervasive atmosphere of a religious institution. The danger arises from the nature of the institution, not the nature of the pupils. *Wolman v. Walter*, 433 U.S. at 247-48.

If these services are offered at truly *religiously neutral locations*, the danger perceived in *Meek* does not arise, and the corresponding entangling supervision by publicly paid state inspectors on parochial school property would be largely unnecessary. *Wolman v. Walter*, 433 U.S. at 247-48. "Supervision of public employees performing public functions *on public property* does not create any entanglement between church and state. *Id.* at 248 (emphasis added). Instruction conducted *on the premises* of pervasively sectarian institutions, on the other hand, while providing a practical response to the growing economic needs of parochial schools and the state, creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.[13]

The nature of the aid—continuing remedial instruction on-premises—necessarily contaminates the relationship between the religious authorities and the government's in-

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[13] Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. *See* pp. 15-16. Second, the court notes that such a holding reflects no more of an "absolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se" rules, obviously followed a similar analysis.

dependent contractor.[14] On-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision. *See Wolman v. Walter*, 433 U.S. 229 (1977). "The prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." *Meek v. Pittenger*, 421 U.S. at 370, citing *Lemon v. Kurtzman*, 403 U.S. at 619.

The *danger* perceived in *Meek* does not subside with the abandonment of religious artifacts. Religious neutrality cannot exist on the premises of a pervasively sectarian institution. The need for state monitoring in parochial schools is a continuing one. Even monitoring, however, cannot extinguish subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every student's hands, and by a teacher's own felt presence of the Church in the room.

The room belongs to the church and is in its ultimate control. Like the public school teachers described in *Felton*, BHHC's Title I instructors are

> so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same buildings, teach the same students, and confer with the teachers hired by the religious schools, many of the members of religious

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[14] The Court in *Wheeler v. Barrera*, 417 U.S. at 426 indicated that the Fourth Amendment implications may vary according to the precise contours of the plan that is formulated. It noted that a program whereby a former parochial school teacher is paid presents "quite different problems" from a program whereby a public school teacher, under public control, is sent into the parochial school. We agree that *different problems* are presented and note the wisdom of the Court's admonition that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*

> orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

Felton v. Secretary, United States Dep't. of Educ., 739 F.2d at 67-68. It cannot be said that on-premise Title I rooms, like the off-premise sites in *Wolman*, are "neither physically nor educationally identified" with the nonpublic school. *See Wolman v. Walter*, 433 U.S. at 247.

To prevent teachers from indoctrinating children with values of the church, the government is not only required to maintain rooms free of religious symbols, it is required to monitor the instruction and to guard against visible religious authorities who by their presence at or near a Title I room may inadvertently pressure teachers to conform. *See Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961, 94 S. Ct. 3163, 41 L. Ed. 2d 1154 (1974). The need for this constant on-premise monitoring or surveillance, described by some courts as "state inspectors prowling the halls of parochial schools and auditing classroom instruction," *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 67, citing *Lemon v. Kurtzman*, 403 U.S. at 650 (opinion of Brennan, J.), added to the routine administrative contacts otherwise required to establish the program, to coordinate schedules, and to advise parochial school teachers of a student's progress, creates entanglement which far surpasses that necessitated by off-premise instruction.[15]

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[15] *Meek* rested on the conclusion not that instruction of pervasively sectarian premises actually "fostered" religion, but rather that it required *monitoring* violative of the entanglement test. *Wolman* affirmed *Meek's* prohibition of services, stating that the "danger arose [in *Meek*] from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman v. Walters*, 433 U.S. at 247.

Religion demands a spiritual identification. The obvious covering of religious symbols and removal of religious artifacts do not diminish qualitatively the spirituality of an environment otherwise pervasively sectarian. And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered—the church has been compromised.

Analytically, a government that can provide on-premise remedial instruction in parochial schools may provide on-premise instruction in all secular subjects in those schools. *Accord Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d at 66-67. Because we recognize that the religiously affiliated school, as a *whole*, has as a central purpose, the fostering of religion, and that the pieces comprise the whole, we recognize that state control over any substantial portion of those pieces undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education. Title I, on its face, does not require or suggest that its program be conducted on the premises of religiously affiliated schools. *See Wheeler v. Barrera*, 417 U.S. at 419. On its face, Title I does not violate the Establishment Clause.

The momentum developed in this area of the law may continue only if sanctioned by further Supreme Court opinions. The risk early envisioned by the Court is increased by the "difficulty of perceiving in advance exactly where the 'verge' of the precipice lies." *Lemon v. Kurtzman*, 403 U.S. at 624. We concur with the Second Circuit in *Felton*. *Wolman* suggests constitutionally permissible alternatives—all off-premises at religiously neutral sites. Current law does not permit the extension of tax-supported remedial instruction into parochial schools. The precipice lies here.

Epilogue

There is a danger that this decision may be misconstrued by large segments of our society, both those who will agree with it and those who will condemn it. Some may say, because of the strength of their varying convictions, that this result is "anti-religious" in general or "anti-Catholic" in particular. The court mentions this only because there has been intertwined in the filings, court presentations, and in the prior ardent lobbying efforts of the *pro se* plaintiff in particular, some suggestion that his is a crusade against a diabolical heirarchy which is set upon destroying free religion in America. The court expressly disavows any such view.

In reaching the result here announced, this court wants it made absolutely clear that it tolerates no part of the thinking of the "Know Nothings" of the mid-19th Century, or the polemics of Paul Blanshard in the 1930's and 40's or the 1960 opposition to John F. Kennedy because of his Catholicism. If the plaintiffs draw comfort for any such point of view out of this decision, it is only by the sheerest and most accidental coincidence of their views and the dictates of First Amendment law as it has been previously announced by the Supreme Court.

This court is not insensitive to the emotionally unpopular termination of a program of aid to educationally deprived children which may *but need not necessarily* follow this decision. Educational assistance to children who through no fault of their own have been deprived in their early lives and whose futures may be bleak without the kind of remedial education envisioned by this statute is entirely consistent with the long-held American goal of equal access to education for all. Be that as it may, this result is one that is dictated by the necessity of preserving one of the cherished freedoms guaranteed by our Constitution. We concur with Judge Friendly. Such free-

doms were hard won and they are protected only by hard decisions.

Accordingly, it is

ORDERED that defendants' Motion to Stay Disposition of this case is denied. It is further

ORDERED that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in that manner is, therefore, permanently enjoined. It is further

ORDERED that this injunction be stayed pending disposition by the Supreme Court of *Felton v. Secretary, United States Dep't. of Educ.*, 739 F.2d 48, *cert. granted*, —— U.S. —— (1984).

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
United States District Judge

November 28, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Docket Number 77-0254-CV-W-8

G. HUGH WAMBLE, *et al.*

v.

TERREL H. BELL, Secretary of the
U.S. Department of Education, *et al.*

JUDGMENT IN A CIVIL CASE

HONORABLE JOSEPH E. STEVENS, JR.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the Title I bypass as currently administered in Missouri on the premises of religiously affiliated schools violates the First Amendment of the United States Constitution and its further administration in that manner is hereby permanently enjoined. It is further

Ordered that this injunction be stayed pending disposition by the Supreme Court of *Felton v. Secretary, United*

States Department of Education, 739 F.2d 48, *cert. granted*, —— U.S. —— (1984).

/s/ [Illegible]
Deputy Clerk

Date—December 3, 1984

R. F. CONNOR
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0254-CV-W-8

G. HUGH WAMBLE,
Plaintiff,

and

VERLINE COBBINS, *et al.*,
Intervenor-Plaintiffs,

v.

TERREL H. BELL, Secretary of
The United States Department of Education, *et al.*,
Defendants,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Intervenor-Defendants.

[Dec. 24, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN this 21st day of December, 1984, that intervenor-defendants Dempster and Pauline Ferguson, *et al.*, hereby appeal to the Supreme Court of the United States the Memorandum Opinion

and Order of this Court filed on November 28, 1984, and the Judgment of this Court entered on December 3, 1984, in favor of the plaintiff and intervenor-plaintiffs.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: /s/ Charles H. Wilson
CHARLES H. WILSON

By: /s/ Scott M. Matheson, Jr.
SCOTT M. MATHESON, JR.
839 17th Street, N.W.
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/s/ Louis C. De Feo, Jr.
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Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have, this 21st day of December, 1984, served a copy of this "Notice of Appeal to the Supreme Court of the United States," by first-class mail, postage prepaid, upon the following:

Mr. G. Hugh Wamble
4840 N.E. Chouteau Drive
Kansas City, Missouri 64119
PLAINTIFF *PRO SE*

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ATTORNEYS FOR DEFENDANTS

/s/ Charles H. Wilson
CHARLES H. WILSON

APPENDIX D

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et seq.* (1982), provides in pertinent part:

> **20 U.S.C. 2701 Declaration of policy:**
>
> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. Further, in recognition of the special educational needs of children of certain migrant parents, of Indian children and of handicapped, neglected, and delinquent children, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to help meet the special educational needs of such children.
>
> **20 U.S.C. 2736:**
>
> (c) Federal funds to supplement, not supplant regular non-Federal funds

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from regular non-Federal sources and from non-Federal sources for State phase-in programs described in section 2751(b) of this title for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources.

20 U.S.C. 2740:

(a) General requirements:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and meeting the requirements of sections 2732 and 2733 of this title, and subsections (a), (b), (d), and (m) of section 2734 of this title, and subsection (c) of section 2736 of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) By-pass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special

programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

20 U.S.C. 2836(a):

Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 2762 or 2802 of this title, the Secretary shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall reduce or terminate further payments under this subchapter to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under this subchapter, or (2) payments by the State educational agency under this subchapter shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies or State agencies shall be reduced, as the case may be. Where partial payments to a local educational agency are continued under this subsection, the expenditure of the payments shall be subject to such conditions as the Secretary deems appropriate in light of the failure which led to the partial withholding. In the case of a substantial and continuing violation, the Secretary may suspend payments to such agency, after such agency has been given reasonable notice and opportunity to show cause why such action should not be taken.

3. Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.* (1982), provides in pertinent part:

20 U.S.C. 3801:

The Congress declares it to be the policy of the United States to continue to provide financial as-

sistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], but to do so in a manner which will eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C. 3802:

During the period beginning October 1, 1982, and ending September 30, 1987, the Secretary shall, in accordance with the provisions of this chapter, make payments to State educational agencies for grants made on the basis of entitlements created under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] and calculated in accordance with provisions of that title in effect on September 30, 1982.

20 U.S.C. 3803:

(a) Program eligibility

Except as otherwise provided in this chapter, the Secretary shall make payments based upon the amount of, and eligibility for, grants as determined

under the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] in effect on September 30, 1982:

(1) Part A—"Programs Operated by Local Education Agencies" [20 U.S.C. 2711 et seq.]:

(A) Subpart 1—"Basic Grants" [20 U.S.C. 2711 et seq.] and

(B) Subpart 2—"Special Grants" [20 U.S.C. 2721 et seq.].

(2) Part B—"Programs Operated by State Agencies" [20 U.S.C. 2761 et seq.]:

(A) Subpart 1—"Programs for Migratory Children" [20 U.S.C. 2761 et seq.];

(B) Subpart 2—"Programs for Handicapped Children" [20 U.S.C. 2771 et seq.];

(C) Subpart 3—"Programs for Neglected and Delinquent Children" [20 U.S.C. 2781 et seq.]; and

(D) Subpart 4—"General Provisions for State Operated Programs" [20 U.S.C. 2791 et seq.].

(b) Administrative provisions

The Secretary, in making the payments and determinations specified in subsection (a) of this section, shall continue to use the following provisions of title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect on September 30, 1982:

(1) Part E—"Payments" [20 U.S.C. 2841 et seq.]:

(A) Section 191—"Payment Methods" [20 U.S.C. 2841];

(B) Section 192—"Amount of Payments to Local Educational Agencies" [20 U.S.C. 2842];

(C) Section 193—"Adjustments Where Necessitated by Appropriations" [20 U.S.C. 2843]; and

(D) Section 194—"Payments for State Administration" [20 U.S.C. 2844], subject to subsection (d) of this section.

(2) Part F—"General Provisions" [20 U.S.C. 2851 et seq.]:

(A) Section 197—"Limitation on Grants to Puerto Rico" [20 U.S.C. 2853]; and

(B) Section 198—"Definitions" [20 U.S.C. 2854] and conforming amendments to other Acts, except that only those definitions applicable to this chapter shall be used.

(c) Applicability rule

The provisions of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] which are not specifically made applicable by this subchapter shall not be applicable to programs authorized under this subchapter.

20 U.S.C. 3804:

(a) General

Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children.

(b) Program design

State Agency programs shall be designed to serve those categories of children counted for eligibility for grants under section 3803(a)(2) of this title in accordance with the requirements of this subchapter.

(c) Program description

A local education agency may use funds received under this subchapter only for programs and projects which are designed to meet the special educational needs of educationally deprived children identified in accordance with section 3805(b)(2) of this title, and which are included in an application for assistance approved by the State educational agency. Such programs and projects may include the acquisition of equipment and instructional materials, employment of special instructional and counseling and guidance personnel, employment and training of teacher aides, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas, the training of teachers, the construction, where necessary, of school facilities, other expenditures authorized under title I of the Elementary and Secondary Education Act [20 U.S.C. 2701 et seq.] as in effect September 30, 1982, and planning for such programs and projects.

(d) Records and information

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this subchapter).

20 U.S.C. 3805:

(a) Application by local educational agency

A local educational agency may receive a grant under this subchapter for any fiscal year if it has

on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency.

(b) Application assurances

The application described in subsection (a) of this section shall be approved if it provides assurances satisfactory to the State educational agency that the local educational agency will keep such records and provide such information to the State educational agency as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the State agency under this subchapter), and that the programs and projects described—

(1) (A) are conducted in attendance areas of such agency having the highest concentrations of low-income children;

(B) are located in all attendance areas of an agency which has a uniformly high concentration of such children; or

(C) are designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency;

(2) are based upon an annual assessment of educational needs which identifies educationally deprived children in all eligible attendance areas, permits selection of those children who have the greatest need for special assistance, and determines the needs of participating children with sufficient specificity to ensure concentration on those needs;

(3) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the

children being served and are designed and implemented in consultation with parents and teachers of such children;

(4) will be evaluated in terms of their effectiveness in achieving the goals set for them, and that such evaluations shall include objective measurements of educational achievement in basic skills and a determination of whether improved performance is sustained over a period of more than one year; and

(5) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 3806 of this title.

20 U.S.C. 3806:

(a) General requirements

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections 3804(c), 3805(b)(2), (3), and (4), and 3807(b) of this title. Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass provision

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section.

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a) of this section, he shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a) of this section, upon which determination the provisions of subsection (a) of this section shall be waived.

(3) (A) When the Secretary arranges for services pursuant to this subsection, he shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this subchapter.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount he estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsection (a) of this section.

(4) (A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least forty-five days after receiving written notice thereof, to submit written objections and to appear before the Secretary or his designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall like-

wise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Existing bypass provision

Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.] prior to August 13, 1981, shall remain in effect to the extent consistent with the purposes of this subchapter.

20 U.S.C. 3807(b):

A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency shall not be required to provide services under this subchapter outside the regular classroom or school program.

20 U.S.C. 3872:

(a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there

has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chapter the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this chapter; or affected subchapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further payments under the chapter or affected subchapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the chapter or affected subchapter thereof, or (2) payments by the State educational agency under the chapter or affected subchapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

Upon submission to a State of a notice under subsection (1) of this section that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

4. 34 C.F.R. Part 200 (1984), provides in relevant part:

SUBPART E—PARTICIPATION IN CHAPTER 1 PROGRAMS OF EDUCATIONALLY DEPRIVED CHILDREN IN PRIVATE SCHOOLS

§ 200.70 Responsibility of LEAs.

(a) (1) In consultation with private school officials, an LEA shall provide educationally deprived children residing in a project area of the LEA who

are enrolled in private elementary and secondary schools with special educational services and arrangements as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(2) If the LEA decides to serve educationally deprived, low-income children under Section 556(b)(1)(C) of Chapter 1, the LEA shall also provide Chapter 1 services to educationally deprived, low-income children in private schools as will assure participation on an equitable basis of those children in accordance with the requirements in §§ 200.70-200.75 and Section 557(a) of Chapter 1.

(b) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(c) The LEA shall exercise administrative direction and control over Chapter 1 funds and property that benefit educationally deprived children in private schools.

(d)(1) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency or corporation who or which, in the provision of those services, is independent of the private school and of any religious organizations.

(2) This employment or contract must be under the control and supervision of the public agency.

(e) In its application for Chapter 1 funds, the LEA shall make provision for services to educa-

tionally deprived children attending private elementary and secondary schools.

(Sec. 555, 20 U.S.C. 3804; Sec. 556(b)(5), 20 U.S.C. 3805(b)(5); Sec. 557(a), 20 U.S.C. 3871(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.71 Factors used in determining equitable participation.

(a) *Equal expenditures.* Expenditures for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the LEA.

(b) *Services on an equitable basis.* The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 556(b)(3), 20 U.S.C. 3805(b)(3))

§ 200.72 Funds not to benefit a private school.

(a) An LEA shall use Chapter 1 funds to provide services that supplement the level of services that would, in the absence of Chapter 1 services, be available to children in private schools.

(b) An LEA shall use Chapter 1 funds to meet the special educational needs of children in private schools, but not for—

(1) The needs of the private schools; or

(2) The general needs of the children in the private schools.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.73 Use of public school employees.

An LEA may use Chapter 1 funds to make public employees available in other than public facilities.

(a) To the extent necessary to provide equitable Chapter 1 services designed for children in a private school; and

(b) If those services are not normally provided by the private school.

(Sec. 557(a), 20 U.S.C. 3806(a))

§ 200.74 Equipment and supplies.

(a) To meet the requirements of Section 557(a) of Chapter 1, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with Chapter 1 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Sec. 557(a), 20 U.S.C. 3806(a); Sec. 596(a), 20 U.S.C. 3876(a))

§ 200.75 Construction.

No Chapter 1 funds may be used for repairs, minor remodeling, or construction of private school facilities.

(Sec. 557(a), 20 U.S.C. 3806(a))

SUBPART F—DUE PROCESS PROCEDURES

PROCEDURES FOR BYPASS

§ 200.80 Bypass—General.

(a) The Secretary implements a bypass if an LEA—

(1) Is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) Has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools.

(b) If the Secretary implements a bypass, the Secretary waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services. Normally, the Secretary hires a contractor to provide the Chapter 1 services for private school children under a bypass. The Secretary deducts the cost of these services, including any administrative costs,

from the appropriate allocations of Chapter 1 funds provided to the affected LEA and SEA. In arranging for these services, the Secretary consults with appropriate public and private school officials.

(Sec. 557(b), 20 U.S.C. 3806(b))

§ 200.81 Notice by the Secretary.

(a) Before taking any final action to implement a bypass, the Secretary provides the affected LEA and SEA with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the LEA and SEA to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the LEA and SEA that they have at least 45 days from receipt of the written notice to submit written objections to the proposed bypass and may request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the LEA and SEA by certified mail with return receipt requested.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.82 Bypass procedures.

Sections 200.83-200.85 contain the procedures that the Secretary uses in conducting a show cause hearing. These procedures may be modified by the hearing officer if all parties agree it is appropriate to modify them for a particular case.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A)).

§ 200.83 Appointment and functions of a hearing officer.

(a) If an LEA or SEA requests a show cause hearing, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery, or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the LEA, SEA, and representatives of the private school children of the time and place of the hearing.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.84 Hearing procedures.

(a) At the hearing, a transcript is taken. The LEA, SEA, and representatives of the private school children each may be represented by legal counsel, and each may submit oral or written evidence and arguments at the hearing.

(b) Within ten days after the hearing, the hearing officer indicates that a decision will be issued on the basis of the existing record, or requests further information from the LEA, SEA, representatives of the private school children, or Department of Education officials.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))

§ 200.85 Post hearing procedures.

(a) Within 120 days after the hearing record is closed, the hearing officer issues a written decision on whether the proposed bypass should be implemented. The hearing officer sends copies of the de-

cision to the LEA, SEA, representatives of the private school children, and the Secretary.

(b) The LEA, SEA, and representatives of the private school children each may submit written comments on the decision to the Secretary within 30 days from the receipt of the hearing officer's decision.

(c) The Secretary may adopt, reverse, or modify the hearing officer's decision.

(Sec. 557(b)(4)(A), 20 U.S.C. 3806(b)(4)(A))